No. 89-1048

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

FMC CORPORATION,

Petitioner,

v.

CYNTHIA ANN HOLLIDAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PENNSYLVANIA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE INTEREST OF AMICUS CURIAE PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

Pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the Pennsylvania Trial Lawyers Association files this Brief as Amicus Curiae supporting the position of Respondent Cynthia Ann Holliday. Signed consents permitting the filing of this Brief, from Counsel for Petitioner FMC Corporation Charles Kelly, and from Attorney Thomas G. Johnson representing Respondent Cynthia Ann Holliday, have been filed with the Clerk of this Honorable Court. The Pennsylvania Trial Lawyers Association is a private non-profit association with a membership of nearly 4,500 trial attorneys in the Commonwealth of Pennsylvania, predominately representing injured

parties in their attempt to seek redress for their injuries in the Courts. The issue of subrogation in Pennsylvania automobile cases has a significant impact on the interests of injured parties and on the practice of law in Pennsylvania. Any determination, therefore, by this Honorable Court of the issues in the case at bar will directly affect the members of the Pennsylvania Trial Lawyers Association and the interests of their clients.

This Brief is filed timely pursuant to the schedule established by Order of this Honorable Court for the filing of the Brief of the Respondent.

SUMMARY OF ARGUMENT

This Court has repeatedly stated that it is necessary to consider the Congressional purpose behind the ERISA preemption, savings and deemer clauses in order to determine if a state law is preempted by ERISA. There is a presumption against preemption and this Court has determined that Congress did not intend that the ERISA preemption clause would invade the traditional areas of state regulation, including motor vehicle insurance laws which includes the Pennsylvania Motor Vehicle Financial Responsibility Law.

The "bright line" test of Metropolitan Life Insurance Co., does not provide an easy answer to the facts of this case. FMC itself has invoked

the Pennsylvania law in question and has used and seeks to continue to use parts of the state law to its own advantage. It therefore asks that this Court only preempt certain portions of the Pennsylvania law although this Court has previously stated that a law that is preempted by ERISA is not saved merely because it furthers the purpose of a plan or the substantative requirements of the ERISA statute. Therefore, FMC cannot preempt only those portions of the law it seeks to ignore. Any administrative burden caused by different motor vehicle insurance laws in each state was willingly assumed by FMC when it specifically incorporated those different laws into its plan. If this Court were to reverse the decision

below, it would not promote national uniformity in the administration of this ERISA plan since the plan itself sought to invoke the benefits of the different statute in each state.

The Pennsylvania law comes within the definition of the "savings clause" and it does not "deem" the plan to be an insurance company. The law in question regulates insurance companies as well as other entities and the Court below found that the plan was covered by Section 1719 of the Pennsylvania law, which section applies to insurance companies as well as to other noninsurance entities. Therefore, the Pennsylvania law does not run afoul of the deemer clause of ERISA.

ARGUMENT

I. CONGRESS DID NOT INTEND AND THE DECISIONS OF THIS COURT DO NOT REQUIRE THAT THE PENNSYLVANIA MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW BE PREEMPTED BY SECTION 514 OF ERISA.

All of the parties and virtually all of the Amicus briefs agree that three sections of the Employment Retirement Income Security Act of 1984 (ERISA), 29 U.S.C. §1144, must be analyzed to determine if the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) is preempted in this case.

Section 514(a) of ERISA, 29 U.S.C. §1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan". Therefore the first test of preemption is whether a state law comes within the

meaning of section 514(a) such that it would be preempted.

If a state law comes within this section, then one must determine if it comes within the "savings clause" which provides as follows:

> Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

29 U.S.C. §1144(b)(2)(A). All of the parties and their amicus supporters agree that the MVFRL is "saved" by the savings clause.

When a particular state law is "saved" by this section, then we must still look to the so-called "deemer clause" which provides as follows:

> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other

> insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies or investment companies.

29 U.S.C. §1144(b)(2)(B).

It might initially seem that one could simply read these three sections and reach a determination as to whether or not the MVFRL is preempted by ERISA. However, the path to such a decision is not that clear. This Court has noted that:

> The two preemption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general pre-emption clause broadly preempts state law, the savings clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously

> taken away, it does not normally do both at the same time.

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985).

The FMC Corporation and its Amicus supporters would argue that the Court can simply apply the "bright line" test of Metropolitan Life to determine whether or not a particular law is preempted. The test would solely turn on whether a plan was self-funded or purchased insurance policies to provide benefits. Apparently, FMC argues that a self-funded plan is not subject to any state laws of any type no matter how tenous the relationship is to a plan. This method of analysis is

appropriate and useful in determining whether ERISA preempts state laws that require insurance companies or other entities to provide certain mandatory minimum benefits. However, the test is too simplistic and inappropriate to apply in a case such as the matter at bar which does not involve the mandatory provision of benefits. The Court of Appeals below has applied this bright line test in appropriate cases, see Insurance Board of Bethelem Steel Corp. v. Muir, 819 F.2d 408, 410 (3d Cir. 1987). However, the Court of Appeals held that this test was inappropriate to determine the issues in the case at bar.

Contrary to the argument of FMC and its supporters, this Court has held that it is necessary to determine the

intention of the Congress in enacting the preemption clause in order to determine if a particular law is preempted by ERISA. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); Metropolitan Life Ins. Co., 105 S.Ct. at 2389; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-52, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). There is a presumption against preemption. Metropolitan Life Ins. Co., 105 S.Ct. at 2390.

While the preemption clause of ERISA is very broad, this Court has determined that "we must also presume that Congress did not intend to preempt areas of traditional state regulation." Metropolitan Life Ins. Co., 105 S.Ct. at 2389. Certainly state automobile

insurance laws are a familiar example of an area of traditional state regulation; see Metropolitan Life Ins. Co., 105 S.Ct. at 2383.

The Congressional intent in enacting the preemption provision of ERISA was to shield benefit plans from conflicting state and local regulations which would interfere with the administration of employee benefit plans. Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211, 2216-2217, 96 L.Ed.2d 1 (1987); Shaw, 463 U.S. at 105. Congress intended for ERISA to do this without interfering with the ability of the states to regulate their traditional areas of responsibility.

> ERISA pre-emption analysis 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.'

Fort Halifax Packing Co., 107 S.Ct. at 2221, citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522, 101 S.Ct. 1895, 1905 (1981). This is exactly the analysis which the Court of Appeals undertook in this matter. This analysis was in keeping with the clear mandate of the decisions of this Court.

State automobile insurance laws are clearly a traditional area of regulation by the states and all of the briefs submitted in this matter agree that the MVFRL is such a state automobile insurance plan. Nonetheless, Petitioner and its amicus supporters do not undertake any analysis as to the Congressional intent behind the preemption clause other than to argue that it is an automatic preemption which requires no further analysis.

This argument does not comport with the decisions of this Court noted above.

This Court has in several of its recent decisions permitted state laws to withstand preemption even beyond those that would be saved by the "savings clause" of ERISA. Mackey v. Lanier Collections Agency, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988); Fort Halifax Packing Co., Inc. v. Coyne, supra.

In Mackey v. Lanier Collections Agency, the Supreme Court considered a Georgia garnishment law which specifically exempted the funds or benefits of an ERISA employee benefit plan from garnishment. The Court initially struck that portion of the Georgia garnishment law because it

specifically applied only to ERISA plans. However, the Court refused to rule that ERISA superseded Georgia garnishment laws in general and as part of its discussion listed numerous state laws which "although obviously affecting and involving ERISA plans and their trustees, are not preempted by ERISA §514(a)." 108 S.Ct. at 2187. The Court in Mackey analyzed the purpose behind the preemption clause and held that Congress did not intend to preempt garnishment laws even though they do "relate to" ERISA benefit plans.

A similar result was reached in Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1984). There the Second Circuit held that the state plan regulating hospital insurance rates was not preempted by

ERISA noting that it is clear that ERISA does not preempt every state law that incidentally touches pension plans. 749 F.2d at 138. In Shaw v. Delta Airlines, Inc., 463 U.S. 85, 87, 103 S.Ct. 2890, 2901 the Supreme Court held that "some state actions may effect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."

The Pennsylvania MVFRL is not directed at ERISA plans nor does it deal with the subjects regulated by ERISA. This Pennsylvania law is concerned with no-fault automobile insurance and state civil pleading and evidentiary rules, all of which are areas of traditional state regulation. It does not require employee benefit

plans to provide coverage for automobile accidents or even to provide any health benefits coverage at all. The MVFRL does not materially "relate to" or "purport to regulate" ERISA plans and therefore is not preempted. Indeed, it is the FMC Corporation itself which invoked the Pennsylvania MVFRL for its benefit and now seeks to preempt only certain portions of that law.

II. ERISA DOES NOT PERMIT A PARTIAL PREEMPTION OF A STATE LAW AS PETITIONER REQUESTS.

It must be noted that the FMC plan specifically invokes state automobile no-fault motor vehicle coverage. In this case FMC took advantage of the Pennsylvania MVFRL to its benefit. As the Amicus brief for the United States notes in footnote 1 on page three of

its brief, the Plan took advantage of the statute to have the first $10,000.00 of medical expenses paid by Mr. Holliday's automobile insurance carrier. It also appears, as noted in that footnote, that the plan obtained further relief from the Pennsylvania Catastrophic Loss Trust Fund established in the Pennsylvania MVFRL, 75 Pa. C.S.A. §§1761 et seq. (Repealed December 12, 1988). The Catastrophic Loss Trust Fund was a state established medical fund financed by a charge on every registered vehicle in the state which paid those medical expenses incurred in motor vehicle accidents in excess of $100,000.00.

FMC does not actually seek to preempt the entire state law but rather seeks to preempt Section 1720 of the

law while taking advantage of all of the other benefits of the law. This Court has already decided that if a state law is preempted then it does not matter that the state law is consistent with the purposes of the benefit plan or with the substantative requirements of ERISA. Mackey, 108 S.Ct. at 2185; Metropolitan Life, 105 S.Ct. at 2389. As this Court pointed out in Mackey,

> . . . there is simply no logical way to construe the English language so that garnishment or attachment laws "relate to" benefit plans when they are invoked by creditors of the beneficiaries, but not when they are invoked by beneficiaries or creditors of the plan itself.

Mackey, 108 S.Ct. at 2188.

In Mackey, the Georgia garnishment law in question clearly supported the benefit plan and furthered the purpose

of ERISA by exempting funds or benefits of a plan from garnishment. This Court held that this portion of the Georgia garnishment law was preempted. FMC has not attempted to explain how parts of the MVFRL would be preempted but other parts would not.

In its brief before the Third Circuit Court of Appeals, FMC stated that it wanted to invoke Pennsylvania state law on subrogation and cited several Pennsylvania case decisions to that effect. (FMC did this even though subrogation has not been available in automobile cases in Pennsylvania since the passage of the 1974 No-Fault Motor Vehicle Insurance Act.) If state laws "relate to" ERISA plans when they prohibit subrogation, then the state laws permitting subrogation in other

cases would also "relate to" ERISA plans. These subrogation laws would also be preempted and therefore not available to FMC. FMC tried to skirt this issue by referring to to the subrogation law as "common law" but its citation of Pennsylvania cases clearly indicated that it was referring to Pennsylvania common law. "Common law" is judicial decisional law as opposed to statutory law. Under the definition section of ERISA:

> The term "state law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.

29 U.S.C.S. §1144(c)(1). Obviously this would include judicially decided common law. If all state laws are automatically superceded even if they only remotely relate to an ERISA plan,

as FMC argues, then FMC could not take advantage of state subrogation laws as it seeks to do in this case. As this Court determined in Mackey, Congress never intended to provide such an unbounded preemption.

The mischief posed by FMC's interpretation of ERISA preemption would go even beyond this point. As the Petitioner quotes its plan on page 5 of its brief the plan requires that:

> If you bring a liability claim against any third party, benefits payable under this Plan must be included in the claim, and when the claim is settled you must reimburse the Plan for the benefits provided.

Under the MVFRL and similar state automobile insurance laws, injured parties are often precluded from pleading or proving certain items of

damages in tort actions or are otherwise restricted in bringing a suit in tort. FMC's argument, however, is that its subrogation language in the benefit plan would be enforced regardless of state law. This would mean either that injured parties would have to pay monies to FMC that they did not recover in state court actions, a definition of "subrogation" not known heretofore, see Allstate Insurance Co. v. Clarke, 364 Pa. Super. 196, 527 A.2d 1021 (1987), or else FMC would have the federal courts change state automobile tort law. Indeed, a plan could write any procedural or evidentiary rule into its plan and seek to enforce it against non-beneficiaries. The state laws limiting evidence or items of damages in a no-fault system would be preempted

under FMC's argument. For example, in the case at bar, Ms. Holliday would be required to bring FMC's claim against the Defendant tortfeasor even though a state law may prohibit the pleading or proof of certain elements of medical damages. Such a position would mean chaos in the legal system. Because a self-funded ERISA plan put certain provisions into its Plan, a plan beneficiary could sue a defendant for damages not permitted to a non-beneficiary in the same accident. This would not be a case of federal law preempting state law but, rather, a case of a private plan preempting state law. Such a result could never have been the intention of Congress. This would require a severe intrusion upon a traditional area of state regulation

while the state law only incidentially touches an ERISA plan.

III. REVERSAL IN THE CASE AT BAR WILL NOT PROMOTE UNIFORMITY IN THE ADMINISTRATION OF ERISA PLANS.

The major argument advanced by Petitioner and its amicus supporters is that reversal of the Court below will somehow enhance uniformity of the administration of ERISA plans. This is clearly not the case. It cannot be overlooked that it was the Petitioner FMC Corporation which invoked the Pennsylvania MVFRL by the language in its plan. The FMC plan invokes the state automobile insurance law of each state in coordinating and construing its benefits. By doing so, the plan obviously intends to save money but immediately subjects itself to

different state insurance schemes in each of the 50 states. The fact that FMC itself would invoke such laws clearly undercuts its argument that uniformity is necessary as to its subrogation interest when it is the plan itself that invoked 50 separate schemes. If uniformity of administration had such overriding importance as FMC argues to this Court, it is hard to understand why the FMC plan would deliberately chose to invoke 50 different laws.

IV. SECTION 1720 OF THE MVFRL DOES NOT "DEEM" THE FMC BENEFIT PLAN TO BE IN THE BUSINESS OF INSURANCE.

All of the parties and their amicus supporters agree that if the MVFRL "relates to" ERISA such that it is superseded by §514(a), then it is "saved" by §514(b)(2)(A).

This means that the MVFRL would not be preempted by ERISA unless the Pennsylvania law "deems" the benefit plan to be an insurance company or other insurer for purposes of any law purporting to regulate insurance companies or insurance contracts. 29 U.S.C. §1144(b)(2)(B). It is important to note that the language of the savings clause and the language of the deemer clause are different. The savings clause is very broadly worded to preserve all state laws regulating insurance. The deemer clause will only allow preemption in the specific instances where the state law "deems" the benefit plan to be an insurance company or other insurer as specified in the deemer clause.

An analysis of the plain language of the MVFRL shows that it does not "deem" the benefit plan to be an insurer in refusing to recognize subrogation. The language in Sections 1719 and 1720 of the MVFRL differentiates between insurance companies and other entities that might provide benefits as listed in that law. FMC recognizes this and in its brief in the Court below pointed out that Section 1720 precludes recovery for four types of entities, each entity defined separately in Sections 1711, 1712, 1715 and 1719 of the MVFRL. FMC recognized that Sections 1711, 1712 and 1715 apply distinctly and solely to insurance companies. If Cynthia Holliday had attempted to resist the subrogation clause pursuant to any of those three

sections, then the MVFRL would effectively be deeming the benefit plan to be an insurance company or other insurer. This would not be permitted under ERISA.

In the case at bar, however, the Court below found that Section 1719 of the MVFRL applied to the Petitioner. This particular section of the MVFRL applies to insurance companies as well as to other entities, although "its principal and substantial effect is nonetheless on the insurance industry". FMC v. Holliday, 885 F.2d 79, 86 (3d Cir. 1989). Therefore, it was not necessary for the MVFRL to deem the benefit plan to be an insurance company or other insurer and the Statute does

not run afoul of the "deemer clause".[1]

FMC has argued that several decisions of the Courts of Appeals for

1. It may be argued that, because the MVFRL to this extent also applies to entities other than solely insurance companies, it may be outside the savings clause. However such is not the case. In United Food & Commerical Workers v. Pacyga, 801 F.2d 1157 (9th Cir. 1986), a case cited with approval by FMC Corporation to this Court, the Court of Appeals for the Ninth Circuit noted that the anti-subrogation law in that case applied to parties other than insurance companies but held nonetheless that the law substantially complied with the test of a McCarran-Ferguson Law and therefore came within the savings clause. 801 F.2d at 1161. Both this Court and the Supreme Court have recognized that no one part of the three part McCarran- Ferguson test is dispositive and a law may regulate the insurance business without fully complying with all three requirements. Pilot Life, 41 U.S. at 51; Insurance Board of Bethlehem Steel Corp. v. Muir, 819 F.2d 408, 411 (3d Cir. 1987); FMC v. Holliday, 885 F.2d 79, 86 (3d Cir. 1989); Northern Group Services v. Auto Owners Insurance Co., 833 F.2d 85, 90 (6th Cir. 1987).

the various Circuits have found a different interpretation of the deemer clause than argued herein. However, the cases cited by the Petitioner are readily distinguished from the issue in the case at bar. In Childrens Hospital v. Whitcomb, 778 F.2d 239 (5th Cir. 1985), the Court preempted a state statute mandating that benefit plans provide a certain level of benefits for mental health problems and other illnesses. In Liberty Mutual Insurance Group v. Iron Workers Health Fund of Eastern Michigan, 879 F.2d 1384 (6th Cir. 1989), the Court preempted a state law that required benefit plans to pay benefits to automobile accident victims. These decisions are directly controlled by this Court's decision in Metropolitan Life and the state law in

each case would necessarily treat the plan as an insurance company.

In Powell v. Chesapeake & Potomac Telephone Co. of Virigina, 780 F.2d 419 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986), the issue was whether the state insurance trade practices law applied to a benefit plan. To hold the plan subject to the insurance trade practices law would necessarily require that the state "deem" the plan to be an insurance company. In United Food & Commerical Workers v. Pacyga, 801 F.2d 1157 (9th Cir. 1986) and Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989), the Circuit Courts preempted state laws prohibiting subrogation in general. Neither of these cases involved a comprehensive state automobile insurance law regulating this

traditional area of state interest. Indeed, the Baxter decision determined that since this was a question of the state common law prohibition on subrogation, the subrogation law was not directed toward the insurance industry and therefore did not even come within the "savings clause" of ERISA. There is agreement among all of the parties and the amicus supporters that the MVFRL does come within the savings clause. In Pacyga, the Ninth Circuit gave very limited discussion to whether the general subrogation statute was directed at the insurance industry and noted that it did simply because "many of the Arizona cases relating to the law" were insurance cases although the Court noted that many cases were not. That case did not involve a

comprehensive state automobile insurance law as does the case at bar. The only cases which analyzed ERISA preemption and the traditional state regulation area of motor vehicle insurance laws were the case at bar and Northern Group Services v. Auto Owners Insurance Co., 833 F.2d 85 (6th Cir. 1987). Both of these decisions found it necessary to analyze the reasons behind the preemption, savings and deemer clauses and determined that the state motor vehicle insurance law was not preempted by ERISA.

A straightforward reading of the deemer clause in conjunction with the savings clause will show that the MVFRL does not "deem" the plan to be an insurance company or other insurer and therefore, given the agreement by all

parties that the MVFRL is covered by the savings clause so as to avoid preemption, the Pennsylvania Law is not preempted.

CONCLUSION

The congressional purpose behind the ERISA preemption, savings and deemer clauses does not support preemption of Section 1720 of the Pennsylvania Motor Vehicle Financial Responsibility Law. FMC is not permitted to pick those portions of state laws which it wants to preempt and those portions of state laws which it wishes to exercise for its own benefit. The FMC Corporation specifically incorporated 50 different state automobile insurance laws into

its plan and reversing the Court below will therefore not further national uniformity in the administration of this ERISA plan.

There is no simple test for determining the congressional intent behind the preemption clause given the facts in this case. There is a presumption against preemption. Given the tremendous mischief that the FMC position would wreak on state tort systems as well as on state comprehensive automobile insurance plans, there is no reason for ERISA to preempt this state law.

The congressional purpose behind the preemption clause of ERISA would best be served by affirming the

judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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